SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,
Petitioner,

v.

THE UNITED STATES,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF *AMICI CURIAE,* AMERICAN GUILD OF AUTHORS AND COMPOSERS, BEHAVIORAL PUBLICATIONS, INC., EDWIN H. MORRIS & CO., INC., HARCOURT BRACE JOVANOVICH, INC. AND MACMILLAN, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOSEPH CALDERON
110 East 59th Street
New York, New York 10022
(212) 758-1100

Counsel for
American Guild of Authors and Composers
Behavioral Publications, Inc.
Edwin H. Morris & Co., Inc.
Harcourt Brace Jovanovich, Inc.
Macmillan, Inc.
Amici Curiae

LINDEN AND DEUTSCH
BELLA L. LINDEN
DAVID BLASBAND
JON A. BAUMGARTEN
Of Counsel

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This brief is submitted jointly by the American Guild of Authors and Composers, Behavioral Publications, Inc., Edwin H. Morris & Co., Inc., Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. as *amici curiae* in support of the petition for a writ of certiorari. None of the above *amici* are members of the associations also filing *amicus* briefs.

Harcourt Brace Jovanovich, Inc. and Macmillan, Inc. (or their subsidiaries) are major, diversified publishers whose publications include general trade books, textbooks, workbooks, reference works, tests and journals. Behavioral

Publications, Inc. is a publisher of texts and professional, academic and technical journals.

Edwin H. Morris & Co., Inc. is a music publisher whose business includes educational music publishing of sheet music and folios. The American Guild of Authors and Composers is an association of composers and lyricists who license and derive income from the sales of their copyrighted musical compositions in sheet music and folio form.

The Interests of *Amici* Herein

The *amici* herein include two of the largest educational and reference publishers in the country, a highly specialized publisher in the social sciences, one of the leading music publishers, and an association comprised of approximately 2,500 American composers and lyricists. All are copyright proprietors or publishers of copyrighted works* and depend on use of their copyrighted material for their continued economic welfare and livelihood. The decision of the Court of Claims threatens one of their major sources of income.

The *amici* urge this Court to grant certiorari in defense of their rights to create and profit from intellectual property in a private entrepreneurial economy, and to enjoy the fruits of their endeavors under the same rules of law as other producers and manufacturers. This Court is the appropriate forum to define the federal right of copyright originating in the United States Constitution and to determine whether it may be eroded in favor of another group of entrepreneurs manufacturing new reprographic devices.

The Constitution mandates that creators of private intellectual property (authors) be accorded legal protection equal to that accorded to manufacturers (inventors). The

* The American Guild of Authors and Composers represents the interests of its individual members.

decision below, if left standing, will be a milestone for a contrary proposition. The right of manufacturers of machinery such as photoduplicating equipment to be paid for the use of their machines was not questioned by the Court of Claims; it concluded, however, that the public interest cancelled any right of compensation on the part of the creators of intellectual copyrighted works.

The amici respectfully urge this Court to review and correct a decision which is in error as a matter of law, and which by reason of its holding, looseness of language and erroneous reasoning presents a serious threat to the interests of authors and publishers of "scientific", "educational" and all other literary and musical works, as well as to the intellectual and cultural long-term interests of the nation and the national policy inherent in the Constitution (Article I, Section 8).

The Court below purported to limit its holding to the photocopying of articles from scientific journals by the National Institutes of Health (NIH) and National Library of Medicine (NLM). However, the extent of its holding is all-encompassing. To illustrate:

(1) *Library use:* The decision below permitted free duplication of over 200,000 articles in a single year by two libraries. The permitted usage will not be viewed by the thousands of libraries, archives, public information centers and Federal, state and local agencies and school districts throughout the United States as being limited to the two Governmental libraries involved in this suit. The decision permits all such institutions to justify the free and unauthorized duplication of copyrighted materials in a similar manner.

(2) *"Scientific" works:* Although the decision below dealt with certain medical "scientific" works, its very rationale demonstrates that it is and will be construed to be applicable to permit the photoduplication of all scientific and educational materials. Very little, if anything, which *amici* create or publish falls outside this category.

(3) *"Journal articles":* The Court below permitted the wholesale duplication of entire journal articles. Its language in no manner forecloses the reproduction of entire "articles" from encyclopaedias or anthologies, or of separate chapters of textbooks, or manuals.

(4) *"Photcopying":* There is no definition of this term in the decision below that would preclude its application to encompass such sophisticated reproductive techniques as televised or long distance wire or wireless duplication by the transmission of facsimile copies from central information centers to numerous remote individual users. The decision below encompasses every modern technology which can be used to make single copies available to users. It condones the unrestricted on-demand publishing of amici's publications in preemption of their natural markets and customers.

ARGUMENT

POINT I

The Constitution's authorization of copyright (Article I, Section 8) is paramount over other legal interests.

The United States Constitution provides, in Article I, Section 8, that Congress shall have the power:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;"

The clear intent of the Constitution is to foster scholarship and creativity in order to enhance the cultural, technical and scientific development of the country. Because we have a private enterprise economy, the constitutional fathers established, and the courts have consistently main-

tained,* that the public welfare is best served by economic encouragement to creators of intellectual property. Neither the creation of ad hoc judicial exemptions to the principle of economic incentive nor the preemption of private proprietary rights in intellectual property can serve the public welfare under the framework established by the Constitution.

The decision of the Court below has perverted the language of the Constitution so that the public welfare is deemed not to be the objective of copyright protection, but merely an adversarial consideration. The Court of Claims invites defendants to argue in every case that, despite the view expressed in the Constitution, the elimination of authors' and publishers' rights best serves the public interest.

POINT II

The right to "copy" is a right accorded under the Copyright Act to the proprietors of books and periodicals.

The Court below expressed a "solid doubt" whether the right to "copy" accorded by Section 1(a) of the Copyright Act applies to books and periodicals. The Court's conclusion on this point must be considered more than mere *dicta* because it expressly considered this doubt to be a "powerful factor" in determining that the activities of respondent amounted to fair use.

The language of the Copyright Act is unambiguous. The right to "copy" a work under Section 1(a) means precisely what it says and is expressly applicable to all copy-

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* E.g., in *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954), this Court said:

> "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' "

righted works. There exists no meaningful distinction between the "copying" of a work by conventional printing and its duplication by photomechanical means. The latter is no more than a sophisticated and efficient technology of duplicating the printed word. The acts of "copying", "printing" and "reprinting" a work are functionally identical. The term "print" as used in the Copyright Act of 1909 is not to be confined to a Gutenberg press or letterpress or any other type of machine. A Xerox machine is a printing device in any practical sense of the word "print".

The Court also concluded that the other Section 1(a) rights to "print", "reprint" and "publish" are not violated by duplication and distribution in response to single or individual requests. However, the Court's reliance on "single" duplication is entirely unsupported in the Copyright Act and ignores the fact that the aggregate result of "single" copying is "multiple" copies. A large portion of the commercial market for the publications of the amici are for single copies sold through retail outlets.

If on-demand publishing of copyrighted works is not a proscribed form of "copying", "printing", "reprinting" or "publishing", then the copyright proprietor is without protection against such duplication by commercial interests* as well as by the respondent herein.

POINT III

The lower Court's extension of the doctrine of fair use effectively destroys the benefits of copyright.

In holding that respondent's photocopying activities were a "fair use" of petitioner's works, the Court of Claims concluded that such systematic reproduction of copyrighted works is permissible if the copies are ulti-

* E.g., a corporate library or archive providing photocopies to its research staff. Indeed, a substantial number of NLM's photocopies were distributed to private commercial users.

mately used for scientific purposes. The Court entirely misconstrued the function of respondent's photocopying and the concept of fair use. The privilege of copying "for scientific purposes" which has been recognized under the doctrine of fair use pertains only to the quotation from or similar use of portions of a prior work *in the creation of a new work dealing with similar subject matter.* Compare *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303, 307 (2d Cir. 1966), *cert. den.* 385 U.S. 1009 (1967), with *Wihtol* v. *Crow*, 309 F. 2d 777 (8th Cir. 1962). The Court, however, applied this principle not in furtherance of the independent creation of new works, but to approve respondent's production and distribution of copies of petitioner's own works in the same manner as a bookseller or magazine distributor or, indeed, petitioner and amici themselves.

The Court below also concluded that by characterizing the respondent's activities as fair use it would be ensuring easier and cheaper access to petitioner's works. Although the Court showed a valid concern for the issue of ready access to intellectual property, it confused that concern with unpaid for access. The Court failed to recognize that no Constitutional or statutory rights exist to preempt, without compensation, private literary property for public use.

The majority below also concluded that petitioner had not demonstrated sufficient injury to negate the defense of fair use. The Court's conclusion is unsupportable in a factual context of free distribution of over 200,000 articles a year by respondents. It is illogical to assume that the extensive reproduction and dissemination of free copies of copyrighted works does not supplant the copyright owner's market for the sale of such works. The asserted failure of petitioner to prove specific damage in terms of lost subscriptions or otherwise does not detract from this conclusion.

The crux of the issue, however, is not limited to the precise facts of this particular case. It lies in the

principles of law enunciated by the Court below. Proof of specific damage is simply not a necessary element of copyright infringement. It is generally acknowledged that it is often extremely difficult for a copyright proprietor to prove specific damage. Thus, Section 101(b) of the Copyright Act adopts a policy of statutory damages "in lieu of" actual damages and "even for uninjurious and unprofitable invasions of copyright the Court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, 233 (1952).

Since the statutory provision for "in lieu of" damages cannot be relevant until after a court has found an infringement which is not privileged by fair use, the decision below is in effect a negation of the clear statutory purpose to "give the owner of a copyright some recompense for injury done him in a case where the rules of law render difficult or impossible proof of damages or discovery of profits." *Douglas* v. *Cunningham*, 294 U.S. 207, 209 (1935).

It is submitted that the proper application of the doctrine of fair use requires the Court to make a reasonable estimate of *potential* economic injury. It is entirely unprecedented to conclude that such potential does not exist where a defendant has reproduced intellectual property and distributed it to the same class of persons who might otherwise be served by the copyright owner.

The Court also considered that its "solid doubt" as to the meaning of the right to copy was a factor favoring its determination that respondent's activities comprise fair use. Either the right to copy is protected by the Copyright Act or it is not. If copying is not a protected right then the question of fair use is never reached since that doctrine only excuses what would otherwise be infringements of the proprietor's legal rights. Thus the Court's reasoning is simply a *post hoc* argument; its effect is to accord lesser

consideration to the economic interests of the owners of intellectual property than it accords to the manufacturers of reprographic hardware.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respecfully submitted,

JOSEPH CALDERON
Counsel for
American Guild of Authors and Composers
Behavioral Publications, Inc.
Edwin H. Morris & Co., Inc.
Harcourt Brace Jovanovich, Inc.
Macmillan, Inc.
Amici Curiae
110 East 59th Street
New York, New York 10022
(212) 758-1100

LINDEN AND DEUTSCH
BELLA L. LINDEN
DAVID BLASBAND
JON A. BAUMGARTEN
Of Counsel